No. [redacted]279

IN THE

Supreme Court of the United States,

OCTOBER TERM, 1925.

FEDERAL TRADE COMMISSION,

Petitioner,

—against—

THE AMERICAN TOBACCO COMPANY,

Respondent.

MEMORANDUM OF THE AMERICAN TOBACCO COMPANY IN OPPOSITION TO APPLICATION FOR WRIT OF CERTIORARI.

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The Petitioners have not brought themselves within Rule XXXV. So far from its being important, we assert that this case is in very truth trivial.

We maintain this because——.

First, two of the statements in the opinion of Circuit Judge Rogers that Petitioner complains of (1) that the Commission has no jurisdiction to enforce the Sherman Law; and (2) that there must be a finding that the public interest is involved—are simply *obiter dicta*. (The former question is now before this Court in the *Kodak* case, *post*.)

Second, "The *Beechnut* case differs radically from the instant case."

Third, no human being nor any artificial entity was ever injured by anything complained of.

Fourth, the "Findings" of the Commission show the alleged "activities" had ceased in 1922, several months before the Federal Trade Commission even held its first hearing and the uncontroverted proof is that they had ceased before any complaint by the Federal Trade Commission was filed.

Fifth, precisely similar facts that are made the basis of suspicion against The American Tobacco Company,—involving the same conduct to, or relations with, the same individuals,—were put on the record with reference to P. Lorillard Company, another manufacturer, also a respondent before the Commission, but the Commission dismissed the case against it.

And, finally, Judge Rogers and his associate—sustaining *verbatim* the conclusion set forth in the dissenting opinion of Commissioner Van Fleet—*held* that this respondent's "acts were taken independently of the association and no real proof to the contrary appears. • • • Eliminating evidence of acts of others for which The American Tobacco Company was in no wise responsible, and discarding mere conjecture, there is no proof to warrant an order against The American Tobacco Company" and all the rest is *dicta*.

Statement.

We cannot accept "the facts" as outlined in the petition as a full and unbiased statement of the case. According to our conception, it is only questions of fact that are seriously in dispute, and therefore it is hardly possible, as it might be in a case where questions of law

are principally involved, to make a statement that can be agreed upon by both parties. Furthermore, it is difficult to state the case briefly, but we shall try to state it fairly, and as briefly as possible, indicating the matters that are in dispute.

The Federal Trade Commission charges that the "acts and things done by the respondents and by each of them constituted unfair competition" (Complaint, R., p. 17, fol. 49). The complaint is based entirely on the theory that The American Tobacco Company entered into a conspiracy with an association of wholesale tobacco dealers in Philadelphia—called jobbers—to carry on price fixing activities which were unfair, in the methods of competition employed, to other jobbers *in and around Philadelphia* (Complaint, R., pp. 6-18).

There is nothing in the complaint or findings (R., pp. 1340-1357) that bases this proceeding on a theory that anything The American Tobacco Company did *independently* of the "Wholesale Tobacco and Cigar Dealers Association of Philadelphia, Pennsylvania", was violative of the Federal Trade Commission Act, or any other statute as to which the Federal Trade Commission has jurisdiction.

The order to "cease and desist", so far as it applies to The American Tobacco Company, is an order to cease and desist "from assisting and from agreeing to assist any of its dealer-customers in maintaining and enforcing, in the resale of cigarettes and other tobacco products manufactured by the said The American Tobacco Company, resale prices of such cigarettes and other tobacco products fixed by such dealer-customers, or agreement, understanding or combination with any other dealer-customer of said The American Tobacco Company" (Order, R., fols. 4081-3).

Facts.

After the World War ruinously low prices became prevalent among tobacco jobbers generally and such jobbers in a dozen or a score of cities formed associations—whether they were legal or illegal does not concern us here—for the purpose of protecting themselves from business disaster. Of course tobacco jobbers long before 1921 had frequently complained bitterly to manufacturers of excessive competition in the matter of low prices made by their competitors. But all this does not sustain the statement that "negotiations" were entered into by the association with large tobacco companies or that "dealers who would not maintain agreed prices were reported to The American Tobacco Company who discontinued sales to them", as stated in the petition (p. 4).

The Philadelphia association was "organized in the year 1920 and existed until at least June 9, 1922" (Finding of the Commission, R., p. 1344, fol. 4032).

The "finding" is not that The American Tobacco Company induced the formation of the association; the "finding" is that The American Tobacco Company (and P. Lorillard Company against whom the Commission dismissed its complaint) was used after the organization of the association, as an instrument of the association (R., p. 1352, fol. 4055 *et seq.*).

No charge is made that the two manufacturers were in conspiracy between themselves or that any agreement was made by them or by any one else regarding manufacturer's prices.

The method employed in the attempt to prove that The American Tobacco Company was acting as a tool of the Association is to show that it temporarily discon-

tinued shipments to two of its Philadelphia customers, Murphy Bros. and Charles Seider, and that apparently there was some delay in shipments to two other customers, or rather that such customers complained to The American Tobacco Company's salesman that there was some such delay (R., pp. 697-8).

Without going into detail, we may say, what is obvious, that the tendency is for an excessively low price-making jobber to enlarge his business at a slender margin of profit, or no profit at all—hence the question of credit is closely interwoven with the question of price-cutting.

The President of The American Tobacco Company testified that Murphy Bros. were "cut off" (that is their orders for a time were not filled) for *"credit reasons"* in 1921 (R., fol. 2301), but this was nothing unusual because they had been "off the list" two or three times for credit reasons in the two or three years preceding (R., fol. 2305). They carried such a considerable stock that Mr. James Murphy did not know they "had been dropped from the list of The American Tobacco Company", on that occasion in 1921, until he heard of it on this hearing (R., fol. 1460). They were off the direct list only one month, from September 2, 1921 to October 4, 1921 (R., pp. 418, 419). (The Commission "finds" that Murphy Bros. were discontinued by The American Tobacco Company because of the prices they made) (R., fols. 4061-8).

On or before May 6, 1921, P. Lorillard Company had been holding Murphy Bros. orders for credit reasons (Ex. No. 1, Lor., R., p. 1299).

A jobber named Charles Seider, in Philadelphia, who was primarily a cigar manufacturer, increased his business in 1921 twelve-fold in the P. Lorillard Company

goods and The American Tobacco Company goods by selling "the bulk" of the goods at 10% off the list price. His cost was 10% off the list price, less a cash discount of 2% (R., fols. 1685, 1692-1699). He had previously done a small tobacco jobbing business along with his business of manufacturing cigars. He was off The American Tobacco Company's list about *two months* (R., fols. 1648-50).

He was off the list of the P. Lorillard Company for *six months* (R., fols. 1651-2).

If these two incidents (relative to Murphy Bros. and to Charles Seider) were not significant against the P. Lorillard Company, how are they sufficient to condemn The American Tobacco Company?

It seems that a jobber in Philadelphia named Blumenthal and another jobber in Philadelphia named Fermani were delayed once in getting their shipments. Very vague evidence of this is contained in the testimony of Mr. O'Boyle, a former salesman of The American Tobacco Company, employed in Philadelphia, who says only that both of these dealers complained of delay in getting their shipments (R., fols. 2089-94). After complaint to Mr. O'Boyle apparently shipments went forward at once (R., fol. 2093). We are at a loss to know where counsel get authority for the statement that "shipments to V. Fermani and one Blumenthal, other price cutters were also held up by The American Tobacco Company because of reports made to it by officers of the Association upon information furnished by their investigator". That is mere conjecture —and mistaken conjecture at that. We know of no evidence to support it, and incidentally we know that it is not so.

Respondent's Interest Not Same as Jobbers' Interest.

It is true that the low price epidemic reacted upon the jobbers so that they formed associations to try to remedy the unprofitable situation. It is clear that aggressive selling below the normal prevailing prices, involving as it does credit and over extension of jobbers accounts and demoralization in the regular channels of trade, becomes a matter of concern to the manufacturer, but it does not become so until a long time after it has become a matter of concern to the jobbers. Although the Philadelphia association was formed in 1920, the temporary discontinuance of shipments by The American Tobacco Company and by P. Lorillard Company to Murphy Bros. and Charles Seider did not take place until the spring or summer of 1921 (R., fols. 1816-17, and fols. 2301-2305); and The American Tobacco Company's general circular that the Federal Trade Commission complains about, but does not of itself condemn (except it is said that something in the nature of a threat was there "implied * * * in veiled language"), was not issued until June 29, 1921 (Com. Ex. 10, R., p. 1241).

The jobbers' association then existed in and before 1921, and complaints were received from jobbers, as they always have been received, of the conduct of the jobbers' competitors. The American Tobacco Company, to protect its own interest during the time this association existed (as before and since), found it desirable to discontinue for the time being shipments to two of its customers for reasons that could not be considered without relation to the credit conditions.

It is on this coincidence, trivial as it is, that this case is based. The incidents on which the case against the P. Lorillard Company was based were the same.

Specifications of Error.

Let us come now to the specifications of error, if they may be called such, set forth on pages 5 to 7 of the petition, for a writ of certiorari, designated as "Questions presented" "Paragraph One" to "Paragraph Eight" inclusive.

We submit that "Paragraph One" is the only question presented, requiring serious consideration. We will take it up later.

"Paragraph Two" begs the question until "One" is decided in the Commission's favor, because it assumes that The American Tobacco Company actually did abet an illegal agreement. We submit that the Court did not hold that such abetting was lawful; on the other hand it expressly found that there was no evidence of any such abetting. Mr. Commissioner Van Fleet said, in his dissenting opinion:

> "I believe its (The American Tobacco Company) acts were taken independently of the Association and no real proof to the contrary appears."

The Court below, after citing the above sentence, together with other matter from the opinion of Mr. Commissioner Van Fleet, said:

> "It must suffice now to say that we are entirely in accord with the conclusion that he arrived at, and we are of the opinion that there is no proof which warrants the order which the Commission entered" (Opinion, R., fol. 1457 [1447]).*

*Reference is to printed transcript of Opinion in record. Petitioner has begun transcript of Opinion in record with folio 1 instead of following folio 4218 (the last folio) of record below. The double folio numbers following 1434 are so in the transcript.

We are not here called upon to discuss "Paragraph Two" at length because it becomes important only when this Court decides it desires to sift and weigh the facts, and if it so decides, we will be content to take up paragraph "Two" when the case is presented on its merits as to the law and facts.

"Paragraph Three" is entirely irrelevant. The association of jobbers and the members of that association did not appeal to the Circuit Court of Appeals. Their practises were not in question before the Court. The Court made no determination as to whether their activities were legal or illegal, but the Court found, as above indicated, that there was no evidence to sustain the allegation that the American Tobacco Company cooperated or conspired with them.

"Paragraph Four" assumes this respondent did "join with a jobbers' association". We assert that the Court found that The American Tobacco Company kept aloof from this jobbers' association.

"Paragraph Five". We assert that the Court held nothing as to what was fair competition "for jobbers" as the jobbers were not before the Court, and this respondent was found by the Circuit Court of Appeals to have acted independently of them.

"Paragraph Six". We believe that it is self-evident that the same facts may involve a violation of the Sherman Law and constitute unfair competition, and we believe it is self-evident that there may be a violation of the Sherman Law—for example, a monopoly arrived at by the combination of all competitors—which might be satisfactory and beneficial to all the competitors, and which therefore would not constitute unfair competition, but would be a violation of the Sherman Law.

We submit that the jurisdiction of the Federal Trade Commission is dependent upon the existence of a state of facts which connotes unfair competition, and when those are proved it is unimportant whether they constitute a violation of the Sherman Law or any other law; and if those facts do not constitute unfair competition, the fact that they violate the Sherman Law is immaterial. That is to say, a showing of violating the Sherman Law is not conclusive one way or the other. We have seen fit to make the foregoing observations notwithstanding the fact that in this case, and as to this respondent, the question is academic, as the statements of the Court were *obiter*, because, there being as a fact no evidence of conspiracy or combination between this respondent and the jobbers, there was no conceivable breach of the Sherman Law by this respondent.

"Paragraph Seven" we need not concern ourselves with, as it relates to judicial comment that is professedly merely comment. The comment was as follows:

> "The Act in Section 5 gives to the Commission authority to proceed in unfair competition cases only 'if it shall appear to the Commission that a proceeding by it in respect thereof would be of interest to the public'. There does not appear in the record any 'findings' that this proceeding is one 'of interest to the public'. The complaint, however, begins by stating that 'acting in the public interest pursuant to the provisions' of the Act of Congress the Federal Trade Commission charges that the parties named are using unfair methods of competition in interstate commerce in violation of the Statute. We should suppose that when the hearings were concluded, and the Com-

mission stated its Findings, it would expressly declare whether or not it found the proceeding had been justified as being in the public interest." *John Bene & Sons, Inc.* v. *Federal Trade Commission*, 295 Fed. 729; *L. B. Silver* v. *Federal Trade Commission*, 289 Fed. 985.

"In the present proceeding it is not claimed that the ultimate consumer has been prejudiced. It is nowhere asserted that the price to the ultimate consumer, the purchasing public, has been raised or in any degree affected by the acts complained of and the controversy seems to be one between the jobbers and the amount of the discount they should allow the retailers. *In view of the conclusion we have reached on the merits it is not important to consider whether the Federal Trade Commission has jurisdiction of such controversy as is here involved, and we express no opinion concerning it*" (Opinion, R., 1415-7). (Italics ours.)

We assume it is unimportant to consider here whether as a matter of practice the Commission should have found formally that the matter was of interest to the public. We are not arguing simply that the Commission should have found, as a jurisdictional fact, that the matter was of interest to the public; we are asserting not only that the matter was of no interest to the public, nor any part thereof, but was and is trivial.

"Paragraph Eight": In this paragraph counsel for Petitioner seems to assume that the Court regarded the interest of the public solely from the point of view of whether the activities complained about affected *consumer* prices.

It seems plain to us that any allusion the Court made

to consumer prices was simply to point out one of the features that indicated the triviality of this whole matter. However that may be, "Paragraph Eight", like "Paragraph Two", "Three", "Four" and "Five", assumes the identification of the Respondent with the jobbing association, contrary to the decision of the Court below, that there was not evidence of it.

Legal Practice.

Before going to "Paragraph One" (the first assignment of alleged error in the petition for certiorari), which we believe is the main, if not the only, point now before this Court, or taking up the main argument on that "Paragraph One", we desire to cite an excerpt from a recent decision of this Court, not indeed for the purpose of informing the Court, but for the purpose of indicating the scope and the limits of our argument:

> "The jurisdiction to bring up cases by certiorari from the Circuit Court of Appeals was given for two purposes: First, to secure uniformity of decision between those courts in the nine circuits; and, second, to bring up cases involving questions of importance which it is in the public interest to have decided by this Court of last resort. The jurisdiction was not conferred upon this Court merely to give the defeated party in the Circuit Court of Appeals another hearing. Our experience shows that 80% of those who petition for certiorari do not appreciate these necessary limitations upon our issue of the writ." (Opinion of Mr. Chief Justice Taft in *Magnum Import Co., Petitioner*, v. *Coty*, 262 U. S. 159, 67 Law Ed. 922.) The petition was denied.

It Is Not the Practice of this Court to Allow a Writ on Questions of Fact.

> "• • • the rule is well settled that findings of fact concurred in by two lower courts will not be disturbed by this Court unless shown to be clearly erroneous"—citing cases—(Opinion of Mr. Chief Justice White in *Texas & Pacific Railway Co.* v. *Railroad Commissioners of Louisiana*, 232 U. S. 338, 58 Law Ed. 630).
>
> "• • • pure questions of fact, depending on conflicting evidence and on the peculiar circumstances of the case, • • • had they been the only questions presented by this Court a writ of certiorari would not have been granted." (*Crossman* v. *Burrill*, 179 U. S. 100, 45 Law Ed. 106.)

In *Southern Power Co.* v. *North Carolina Public Service Co.* (263 U. S. 508), there was presented a case in which the District Court had decided in favor of the Petitioner for the certiorari; the Circuit Court of Appeals had reversed that decision and decided the case in favor of the respondent in certiorari proceeding. This Court disposed of the motion for certiorari without considering the merits:

> "This writ must be dismissed • • • the argument developed that the controverted question was whether the evidence sufficed to establish actual dedication of petitioner's property to public use,—primarily a question of fact. That is not the ground upon which we granted the petition, and, sufficiently developed, would not have moved us thereto" (p. 509).

Argument.

We will designate this as our argument, but we realize that just as the object of this writ is not to give the defeated party a new hearing, so the duty of the respondent here is primarily to inform the Court; but not to contend with undue earnestness, or, at any rate, at undue length.

We feel bound first to call the attention of the Court to the view of Judge Hand. The last paragraph of the opinion is as follows:

> "Judge Hand concurs in the result on the ground that by the dissolution of the Association the controversy became moot." (Opinion, R., fol. 1457 [1447].)

It should be emphasized that Judge Hand *concurred in the result*. He did not dissent and hold that our appeal should be dismissed because the controversy had become moot after the decision of the Federal Trade Commission and before the hearing of the appeal. Not at all. He concurred in the reversal of the order on the ground that the controversy was moot at the time it came for hearing before the Federal Trade Commission. Respondents alleged illegal activities implied the continuing activity of the Wholesale Tobacco & Cigar Dealers' Association of Philadelphia—or of its members acting by themselves as conspirators. This organization *existed only until June 9, 1922* (Commission's Findings, R., fol. 4032). The association "*ceased to function February 22, 1922*, and was formally dissolved June 9, 1922" (R., fols. 4090-4217). The complaint was dated May 29, 1922; the

first testimony was taken October 16, 1922, and the case was closed December 19, 1922 (R., fol. 4032).

If the association *ceased to function February, 1922*, it ceased to function *three months before the complaint was filed*, and by the Commission's own findings it "existed" until eleven days only after the complaint was filed, and there is no evidence that the conspiracy of the association went on after the organization was dissolved or even after it ceased to function as an organization. Hence, Judge Hand, in his concurring opinion, places himself on the ground that the order of the Federal Trade Commission against The American Tobacco Company, dated February 16, 1924, should be reversed and set aside because at least as early as February, 1922, or nearly two years before the date of the order, the controversy had become moot.

While we did not base our argument before the Circuit Court of Appeals on that ground, we believe that upon an application of this sort, in which the Petitioner must presumably bring themselves within the penumbra at least of Rule XXXV, these considerations should be before the Court, especially in view of the fact that our argument here is based on the contention that the case, so far from being important, is trivial.

No Evidence Against the Respondent.

"Paragraph One" of the "Questions Presented" (first alleged error), meets the issue fairly. It says:

> "Is the Commission's finding that the American Tobacco Company agreed with the members of the Philadelphia Association to decline to sell its products to any jobber who did not maintain the prices

agreed upon by the jobbers, supported by evidence? The Court below held that it was not."

Now this is the issue: Petitioner asks the United States Supreme Court to sift and weigh the facts in this record of 1,164 pages of actual testimony, and then proceed to determine whether the Court's comments on the law—mostly *obiter*—were technically well stated.

The question whether the record contains *any* evidence to support a given finding of fact is, of course, technically a question of law; it is a question, however, that calls really for a consideration of the whole record and for the qualities of mind that are demanded in the determination of questions of fact. The mere citation of a question and answer from the record is not sufficient, for there may be other parts of the record that are completely destructive of the inference as to a fact that might be drawn from this question and answer, or that would leave such, at best, only a faint scintilla. A minority of the Commission and a majority of the Court have found there is no evidence to support the conclusion that there was combination or co-operation between this respondent and Tobacco jobbers in Philadelphia. If they are right and there was no such evidence, the decision was right, and a writ of certiorari should be denied. If they are conceivably wrong, indeed the real question remains one of fact, and, because the matter has lost importance and general interest, the writ of certiorari should still be denied. Three years and a half have elapsed since these activities are admitted to have ceased. The customers, whose orders The American Tobacco Company saw fit to decline for a few weeks, or a couple of months, have been contented and friendly customers for four and a half years. No retailer and no consumer as

far as we know ever complained about anything that The American Tobacco Company is alleged by the Federal Trade Commission to have done.

The Court below said:

> "We have read this record carefully and are constrained to hold that in pursuing the course The American Tobacco Company adopted we fail to discover anything 'unfair' or 'unreasonable' or in any way contrary to public policy" (Opinion, R., fol. 1420).
>
> "The examination of the testimony convinces us that what the American Tobacco Company is shown to have done is so far removed from constituting an unfair method of trade that it actually tended to promote fairness of trade and the suppression of unfairness in competition. Practices can not be regarded as fair which work the demoralization of the business, and practices can not be regarded as unfair methods of competition if the manufacturer declines to sell to wholesalers who demoralize the legitimate market by selling at prices which those in business regard as insufficient to enable the business to be conducted with reasonable profit. The American Tobacco Company was in our opinion within its rights in declaring that it would not sell to jobbers who made it a practice to sell to retailers at a price which made it impossible for the jobbers to carry on their business at a reasonable profit and worked the demoralization of the trade" (Opinion, R., [1455-6] [1445-46]).

The presiding judge in his Opinion discusses the evidence exhaustively at much greater length than he dis-

cusses the law. He manifests his careful consideration of the record by quoting from the record excerpts which, although they perhaps help to sustain the contention of counsel for the American Tobacco Company, were not alluded to upon the brief or the argument.

Comment on Petitioner's Brief.

We ask this Court to note that the last part of the quotation from the testimony of the late Percival S. Hill, former President of The American Tobacco Company, on page 16 of petitioner's brief, while correctly quoting the record, incorrectly quotes his testimony in that he later corrected himself. He meant to say the converse of what he is quoted as saying. Mr. Hill is quoted as saying:

> "If it (meaning the practice) is satisfactory to The American Tobacco Company, it is satisfactory to the jobber."

Now that is what he said, but what he obviously meant was that if the practice is satisfactory to the jobber (so as to induce him to continue to handle The American Tobacco Company's products), it is satisfactory to The American Tobacco Company, which is a very different thing. It is this last that is of course the reasonable thing. The manufacturer of any article that goes to the consumer through jobbers and retailers is interested in the consumer getting the product at as low a price as is consistent (a) with the manufacturer himself getting a good profit; (b) with the jobbers and retailers getting enough profit to *satisfy* them, so that the channels to the consumer may be open and unimpeded.

Counsel for The American Tobacco Company, before the Examiner for the Commission, noticed Mr. Hill's inadvertence and upon cross-examination Mr. Hill corrected it.

> "Q. What you meant to say, Mr. Hill, was, if the practice was one that the jobbers were satisfied with and their facilities were unimpaired, it was satisfactory to The American Tobacco Company? A. I apologize for my bad use of the English language" (R., fols. 2395-7).

As for the balance of the excerpt (Petitioner's Brief, p. 16), Mr. Hill was simply led into saying that he talked sympathetically and good naturedly with two customers who desired perhaps more than Mr. Hill felt that he could lawfully promise. Mr. Hill testified on cross examination:

> "Q. Did you, as directing the policy of The American Tobacco Company, ever consciously invite or co-operate in, in the making or carrying out of any agreements among jobbers or retailers that would limit their right to sell your products for what they pleased? A. I never have" (fols. 2411-2419).

After the quotation from Mr. Hill above noted petitioner's counsel state in their brief:

> "While there is abundant testimony from which it is proper to draw the conclusion that The American Tobacco Company did agree to help the association maintain its discounts, this proof we submit makes it quite unnecessary to point out the numerous places in the record which themselves would justify the finding as to this agreement" (Brief, p. 16).

In trying to maintain its case, then, Petitioner quotes only one piece of testimony and that contains an obvious and avowed error! If there is other testimony, it would seem to us it is precisely what the Court would require to have pointed out before deciding whether it will read this 1,600 page record. We shall refrain from extended argument as to whether there is any evidence to support the Commission's findings. Our brief below was 73 pages long, most of it dealing with the facts, and our reply brief was 30 pages long, all of it dealing with the facts; and we believe that the Court will not care to hear from us at this time on the merits—except the merits as to whether this is a proper case for the issuance of the writ of certiorari.

Referring to *Texas & Pacific Railway Co. v. Railroad Commissioners*, above cited, we desire to call attention to the fact that while of course there is a different finding in the Circuit Court of Appeals from the finding by the Federal Trade Commission (the original fact-finding body), there was a vigorous dissenting opinion in the Federal Trade Commission by *one of the Commissioners who found precisely as did the Circuit Court of Appeals*; therefore it seems that while the case above referred to is not controlling it should be to some extent persuasive, *especially as the Commission unanimously dismissed the case against P. Lorillard Company on precisely similar suspicion*.

In his dissenting opinion, Commissioner Van Fleet said:

> "Of course conspiracy is often incapable of direct proof but when resort is had to circumstantial evidence as in this case the proof should rise above the dignity of mere suspicion. Some of the evi-

> dence relied upon to sustain the order hardly ever rises to that dignity. Without summarizing the evidence to my mind it appears that the truth is that The American Tobacco Company had nothing to do with the organization of nor conduct of the Association and I know of no proof to the contrary. Also I believe its acts were taken independently of the Association and no real proof to the contrary appears. The Commission dismissed the case against the Lorillard Company for lack of proof and I believe that eliminating evidence of acts of others for which The American Tobacco Company was in no wise responsible and discarding mere conjecture there is not proof to warrant an order against The American Company" (R., fols. 4087-4089).

It is to be observed that there was such a complete harmony between the mind of Commissioner Van Fleet and the minds of the judges of the Circuit Court of Appeals that they quoted in the last page of their opinion this very excerpt from Mr. Commissioner Van Fleet's opinion, followed by the words:

> "It must suffice now to say that we are entirely in accord with the conclusion at which he arrived, and we are of the opinion that there is no proof which warrants the order which the Commission entered" (Opinion, R., fol. 1457 [1447]).

The real question brought up here for decision, then, is the one above discussed, to-wit, whether the Court below correctly decided that there was no evidence to support the Commission's order.

The Law Was Not Incorrectly Held.

We come now to the consideration of whether an important question of law is involved or whether a serious error of law has been made or one which puts the Court in the Second Circuit at variance with the Supreme Court or the other circuits.

It is true that the Court says:

> "The question here is not whether what had been done by The American Tobacco Company constituted a restraint of interstate commerce contrary to the Sherman Law and therefore unlawful. *The Federal Trade Commission is not clothed with jurisdiction to hear and determine that question in this proceeding*" (Opinion, R., fol. 1455 [1445]).

If it is argued that this pronouncement merits the issuance of a writ we may say, first, it is *obiter dicta* and it is not the practice of the United States Supreme Court to issue a writ, solely to review *obiter dicta* of the Circuit Court of Appeals; moreover, the very question as to whether the Federal Trade Commission has jurisdiction with respect to the Sherman Law is before this Court on a writ of certiorari allowed October 23, 1925, in the case of *Eastman Kodak Co., et al.* v. *Federal Trade Commission* (7 Fed. [2d] 994). We presume that this Court will not desire to issue a writ to decide a question of law which is already before the Court in another case, especially as that principle of law goes to the essence in the case before it and is merely *obiter* in this case.

Petitioner's counsel assert that the decision in this case runs counter to the decision in the *Beech-Nut* case;

but the presiding judge who wrote the opinion does not find it necessary to differentiate this case from *Federal Trade Commission* v. *Beech-Nut Packing Company*, 257 U. S. 441, by learned argument, by fine distinctions or by close reasoning; he simply says:

> "The *Beech-Nut* case differs radically from the instant case" (Opinion, R., 1454 [1444]).

Let us see, by the familiar parallel-column method, how wrong Petitioner is, and how right the presiding Judge is:

"The Beech-Nut Packing Company * * * markets * * * its products through jobbers and wholesalers in the grocery, drug, candy and tobacco lines, who in turn resell to retailers in those lines."	We do that.
"Such wholesale and retail dealers are selected as desirable customers because they are known or believed to be of good credit standing, and"	We, of course, are somewhat concerned that our customers should have good credit standing.
"Willing to resell at the resale prices suggested by the company, and who do resell at such prices, and"	We never suggested any price at which the wholesaler should sell. The list price was merely a basis, but nowhere did the jobber resell at list. In some communities 2% off was perhaps reasonable; in others,

5% off was perhaps reasonable. All we ever suggested was that our customers should not do business at a loss, or a profit so slender that it would not, in the long run, be sound business for them.

"Are willing to refuse to sell, and who do refuse to sell, to jobbers, wholesalers and retailers who do not resell at the resale price suggested by the company, and who do not sell to such jobbers, wholesalers and retailers."

Here we put our finger on the matter that brought the *Beech-Nut* case within the provision of the statute—which requires that the proceeding shall be "to the interest of the public". The Beech-Nut Company tried, evidently, to fix the wholesale resale price and the retail resale price, and it dictated as to what retailers the jobbers should sell to, basing their dictates on whether the retailers maintained the price determined upon by the Beech-Nut Company. There is nothing like that in our case.

"The company • • • maintain • • • a policy known as the 'Beech-Nut Policy' and requests the co-operation therein of all dealers selling the products manufactured by it."

There is nothing like this in our case. Indeed, the allegation is not that we sought the co-operation of the jobbers or the Jobbing Association, but that they sought our co-operation. Of

course, the Commission's attorneys could not seek to bring us within the *Beech-Nut* case here in view of the fact that in point of time our Circular 2783—Exhibit 10—was about a year later than the beginning of the Association.

"In order to secure co-operation and to carry out the 'Beech-Nut Policy' the company issues circulars, price list and letters to the trade, * * * showing suggested uniform resale prices, both wholesale and retail."

There is nothing of this nature in our case. The "maintenance of a 'list'" is nothing more than an ancient, almost universal and convenient means of quoting prices, and the only letter to the trade that may be made the subject of pertinent discussion is Circular 2783, and even the *findings of the Commission* can import sinister meaning to that only by characterizing it as *"implying the same in veiled language."*

"The Beech-Nut Company * * * requests and insists that the selected jobbers, wholesalers and retailers sell only to such other jobbers, wholesalers and retailers as have been and are willing to resell and do resell at the prices suggested by the Company."

That does not touch us.

"and requests and insists that such jobbers, wholesalers and retailers discontinue selling to other jobbers, wholesalers and retailers who fail to resell at the prices so suggested by the Company,"

That does not touch us, either.

"makes it known broadcast to such selected jobbers, wholesalers and retailers, whether sold direct or not, that if they • • • fail to sell at the resale price suggested by the company, it will absolutely refuse to sell further supplies of the product to them, • • • and will also absolutely refuse to sell to any jobbers, wholesalers and retailers whatsoever who sell to other jobbers, wholesalers and retailers failing to resell at the prices suggested by the Company."

We suggested no prices. We simply issued a list from which the jobbers might make a discount of 2%, 4%, 6%, or any other per cent. that would give them a living, and as far as our threat, if it was a threat, in Circular 2783 was concerned, it is to be noted that we never did carry it out. We never suggested, at any time to anybody, that he should not sell to a person who was a price-cutter, nor did we ever do anything to indicate at what price the retailer should sell. Of course, it is inevitable that cigarettes and other tobacco products, which sell in packages fixed as to size, weight, contents or number will sell at a price that calls for a payment in as few coins as possible. Therefore, certain packages are known as a

twenty-five cent size or a ten cent size, as, for example, the famous PALL MALL advertisement: "A shilling in London; a quarter here". Now, PALL MALL might, or might not, sell for a quarter. The use by us, or by the public generally, of the terminology of currency to indicate or denote a particular size package is by no means a dictation of price to the retail dealer.

"It has refused, and does refuse, to sell to practically all such jobbers, wholesalers and retailers reselling to other jobbers, wholesalers and retailers, who have failed to resell at the prices so suggested by it."

This does not touch us.

"It has refused and does refuse to sell to practically all so-called mail order houses engaged in interstate commerce on the grounds that such mail order houses frequently sell at cut prices."

We even sell to mail order houses; nothing to the contrary appears on the record.

"It has refused, and does refuse, to sell to prac-

We, on the contrary, have not refused to sell any, ex-

tically all so-called price-cutters."

cept temporarily in two cases, where it was necessary to reduce their account to normal.

"The Company has and does reinstate as distributors * * * jobbers, wholesalers and retailers previously cut off * * * on the basis of declarations, assurances, statements, promises and similar expressions * * * by such distributors respectively who satisfy the Company that such distributors will thereafter resell at the prices suggested by it, and will refuse to sell to distributors who do not maintain such suggested resale prices."

The record shows, as above indicated, that we did not require any promises upon reinstatement.

"The Company has and does maintain card records containing the names of thousands of jobbing, wholesale and resale distributors, etc., etc."

We have no such system as that.

The Beech-Nut Company instituted the Beech-Nut policy and the question was whether their system was violative of the law. Here the jobbers tried to institute a price arrangement and the Commission tried to prove that the jobbers succeeded in involving this respondent

in it and they failed so to adduce any evidence to support such conclusion.

The Commission is Subject to Rule XXXV.

Possibly counsel for the Petitioner feels that any case in which the Federal Trade Commission is petitioner is in a special category and not within Rule XXXV. It is true, of course, that this Court has permitted great latitude in the allowance of applications for writs of certiorari to the Federal Trade Commission. This was proper and indeed necessary because the statute vitally affected the business of the country and in some aspects was novel and in some aspects uncertain—the Federal Trade Commission statute has, in these respects at least had some resemblance to Income Tax Laws.

The mere circumstance, though, that the Federal Trade Commission comes before this Court asking for a writ of certiorari does not take the case out of the rule. As long as the Federal Trade Commission Act was a new statute, uninterpreted, that very fact tended to throw some given cases within the rule but never made the rule inapplicable. Many cases have gone to the Supreme Court in recent years under the Federal Trade Commission Act, and as the statute gets more and more construction it will need less and less construction in the future. We believe the time is not far distant when it will be difficult to find a question under the Federal Trade Commission Act which merits the issuance of a writ. However that may be, we submit that the United States Supreme Court will not care to review questions of fact, even in a Federal Trade Commission case, when such are of utter triviality.

This Court has recognized that the same rules apply in Federal Trade Commission cases as in other cases.

The writ was denied in *Mishawaka Woolen Mfg. Co.* v. *Federal Trade Commission* (283 Fed. 1022; 260 U. S. 748). That was an application by the company, and the writ was denied assuming that the Federal Trade Commission would modify its order to conform with the order in the *Beech-Nut* case in accordance with the concession of the Solicitor-General that the order which was affirmed by the Circuit Court of Appeals was broader than the order in the *Beech-Nut* case.

Petitions by the Commission for writs of certiorari were denied in *Menzies Co.* v. *Federal Trade Commission* (288 Fed. 774; 262 U. S. 759), and in *National Biscuit Co.* v. *Federal Trade Commission*, and *Loose-Wiles Biscuit Co.* v. *Federal Trade Commission* (299 Fed. 733; 266 U. S. 613). Writs were denied to the respondent companies in *Aluminum Co. of America* v. *Federal Trade Commission* (284 Fed. 401; 261 U. S. 616), and *Butterick Co.* v. *Federal Trade Commission* (4 Fed. (2d) 910; 267 U. S. 602).

The application for writ of certiorari should be denied.

Respectfully submitted,

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